IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JANET B. BRENNER and	:	**CIVIL ACTION**
VIRGINIA A. BROADBELT	:	
v.	:	
	:	
THE HARLEYSVILLE INSURANCE COS.	:	**NO. 01-08**

M E M O R A N D U M

WALDMAN, J. **September 30, 2002**

I. Introduction

Plaintiffs have asserted claims for age discrimination and retaliation under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et seq. and the Pennsylvania Human Relations Act ("PHRA") 43 Pa. C.S.A. § 951 et seq. against their former employer. They have also asserted claims of retaliation under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 et seq.[1]

Presently before the court is the defendant's motion for summary judgment.

[1] The complaint contains ten counts, five for each plaintiff. Plaintiffs complain of age discrimination and retaliation under Federal and state law in Counts I through VIII. In Count XI, Ms. Brenner claims retaliation in violation of ERISA. In a second Count VIII, Ms. Broadbelt complains of the same. The complaint has no Count IX or X.

II. Legal Standard

In considering a motion for summary judgment, the court must determine whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Arnold Pontiac-GMC, Inc. v. General Motors Corp., 786 F.2d 564, 568 (3d Cir. 1986). Only facts that may affect the outcome of a case are "material." Anderson, 477 U.S. 248. All reasonable inferences from the record are drawn in favor of the non-movant. See id. at 256.

Although the movant has the initial burden of demonstrating the absence of genuine issues of material fact, the non-movant must then establish the existence of each element on which it bears the burden of proof. See J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1531 (3d Cir. 1990) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)), cert. denied, 499 U.S. 921 (1991). A plaintiff cannot avert summary judgment with speculation or by resting on the allegations in his pleadings, but rather must present competent evidence from which a jury could reasonably find in his favor. Anderson, 477 U.S. at 248; Ridgewood Bd. of Educ. v. N.E. for M.E., 172 F.3d 238, 252 (3d Cir. 1999); Williams v. Borough of West Chester, 891 F.2d

458, 460 (3d Cir. 1989); Woods v. Bentsen, 889 F. Supp. 179, 184 (E.D. Pa. 1995).

III. Facts

From the competent evidence of record, as uncontroverted or otherwise viewed in the light most favorable to plaintiffs, the pertinent facts are as follow.

Defendant Harleysville is a Pennsylvania insurance corporation with thirty-two field offices throughout the United States and headquarters in Harleysville, Pennsylvania. Janet Brenner was born on June 8, 1942 and hired by Harleysville on September 10, 1979 as a coding clerk. Virginia Broadbelt was born on October 21, 1941 and hired by Harleysville on October 21, 1980 as a sorter. In 1981, she was transferred to the Coding Unit. Both plaintiffs were given the title of senior data coding clerk in 1997. The Policy Control Unit ("Data Entry"), the Technical Support Unit ("Technical Support") and the Coding Unit comprised the Policy Processing Department.

There were three positions in the Coding Unit with the same job description and basic duties but representing different levels of responsibility. Senior coding clerks had more responsibility than coding clerks and coding specialists had more responsibility than senior coding clerks. Specialists did not have supervisory authority but acted as trouble-shooters in their areas of expertise.

As coders, plaintiffs were responsible for handwriting policy information received from field offices onto paper forms that contained blocks for insurance codes. The forms were then given to data entry clerks who keypunched the information into Harleysville's computer system. Each coder's error percentages and lines of code completed each day were recorded and analyzed on a quarterly basis as part of the coder's performance review.

Catherine Murphy was supervisor of the Coding Unit for many years until her retirement in 1995. From October 30, 1995 through May 1997, plaintiffs worked under Debra Niess who supervised both the Coding and Technical Support Units. She had prior supervisory experience within Harleysville but had little coding experience and often asked coders to assist her in handling coding problems. One person Ms. Niess relied upon was Barbara Freeze to whom she directed employees for answers to their questions.

Working relations between plaintiffs and Ms. Freeze were strained. Ms. Freeze sometimes shouted at plaintiffs. Although plaintiffs rarely had questions, Ms. Freeze had provided wrong information to them when they did and plaintiffs proceeded to code on the basis of incorrect information. The errors were later discovered during the course of an audit and plaintiffs were required to redo some coding work.

In March 1997, Ms. Niess promoted Ms. Freeze to the position of coding specialist. Unlike prior promotions, the position had not been opened to other applicants. Plaintiffs believed that another coder, Diane Kreisher, was better qualified for the specialist position and should have been given the opportunity to be promoted.

Ms. Brenner met with Ms. Niess to discuss her concerns about the procedure by which Ms. Freeze was promoted and to complain about Ms. Freeze shouting at her and providing coders with incorrect information. Plaintiffs, along with Ms. Kreisher and Connie Bauer, another coder, met with Joan McAleer, the head of the Policy Processing Department, on March 23, 1997 to express the same concerns.

In April 1997, having received no response from Ms. McAleer, plaintiffs and Ms. Bauer presented their complaints to Elanor O'Brien, a human resources consultant.[2] During the meeting with Ms. O'Brien, plaintiffs complained about Ms. Freeze and criticisms in the April 1997 employee reviews they had received from Ms. Niess. Ms. O'Brien said that she would look into plaintiffs' concerns. When plaintiffs did not receive any response, they arranged a second meeting with Ms. O'Brien. Ms. O'Brien informed plaintiffs that Ms. Freeze would not be demoted,

[2] By the time of the meeting with Ms. O'Brien, Ms. Kreisher no longer worked in the same unit as plaintiffs and no longer participated in any meetings.

that their reviews would not be altered and that if they wanted to continue to pursue their complaints, they should meet with Catherine Strauss, the Vice President of Human Resources.

On November 6, 1997, plaintiffs, along with Ms. Bauer and Ms. O'Brien, met with Ms. Strauss. Plaintiffs complained about Ms. Freeze's promotion and the April 1997 reviews.[3] The following morning, Ms. Strauss met with Ms. O'Brien, Ms. Niess, Ms. McAleer and her supervisor, Mildred Alderfer. Shortly thereafter, Ms. O'Brien and Ms. Strauss met with plaintiffs and Ms. Bauer. Ms. Strauss advised that the April 1997 performance evaluation covered a period of three months and could improve prior to the January 1998 annual evaluation, three quarters of which would reflect a period of time under a new supervisor.[4] When the meeting reached an impasse, in a raised voice Ms. Strauss told plaintiffs that she would address their concerns if they put them in writing with specific examples which could be addressed. Ms. Strauss advised plaintiffs to "let it go" or "it would take care of it itself." Plaintiffs interpreted this as a

[3] Although Ms. Bauer joined plaintiffs in expressing concern about Ms. Freeze, she did not complain about her performance appraisal.

[4] In April 1997, plaintiffs were transferred to a section supervised by Joan Miller.

veiled threat that they would be terminated if they continued to complain.[5]

On November 19, 1997, Ms. Strauss sent an email to plaintiffs asking whether they intended to put their stated concerns in writing. In response, plaintiffs requested a meeting at which they informed Ms. Strauss that they felt she was unresponsive to their grievances and had decided to pursue other avenues.[6]

Plaintiffs and other coders were transferred in April 1997 into a section of the Coding Unit supervised by Joan Miller until her retirement in March 1999. Ms. Miller observed that plaintiffs constantly complained about their coworkers, the work

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[5] Plaintiffs proceeded in a manner consistent with the employee manual. The 1998 edition, which the court assumes is identical to the 1997 edition in pertinent part, provides that employees who believe that they have not been treated fairly should first contact the immediate supervisor. "If your supervisor is unable to help, you should request help from the next higher level of management within your department." That section continues: "[w]e hope most problems will be resolved by the people working in that department. But if a problem cannot be resolved through these regular channels, you should contact the vice president of human resources."

[6] Debra Niess, who is dyslexic, received an anonymous birthday card making fun of dyslexic persons. The writing on the card and address on the envelope were in block print. She also received a number of hoax mailings for bibles, magazines and other periodicals which she did not order. She met with Ms. O'Brien to relate these events and her belief that plaintiffs were responsible. Ms. O'Brien conducted an investigation and obtained several of the subscription forms. Because the forms were also written in block print, her investigation was inconclusive.

they were given and her supervision of them. It was more difficult and time consuming to supervise plaintiffs than any other staff.[7]

During this period, the tensions persisted. In a response to criticisms in a subsequent review, Ms. Broadbelt stated that "neither supervisor [Miller] or manager [McAleer] has a clue and no reason to give me PRL [proficient performer - low] other than slandering and harassing me because of BWF [Barbara Freeze] incident."[8]

In the fall of 1998, Harleysville began to develop a plan to streamline the coding operations by investing in an on-line system. Jessie Nelson, a project manager, was given responsibility for implementation of the new system. A major purpose of converting to the new system was to eliminate a

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[7] Ms. Miller's contemporaneous notes show that Ms. Brenner simply left on one occasion because she felt too much work was being assigned to her, that she kept work related information to herself which others in the unit needed to share, was tardy and was bypassing Ms. Freeze. Ms. Miller found Ms. Broadbelt to be the most difficult person she had ever supervised. When Ms. Miller asked Ms. Broadbelt whether she had any work to do after observing that she had not been working for an extended period of time, Ms. Broadbelt told Ms. Miller she had no business questioning what plaintiff was doing. Ms. Miller observed Ms. Broadbelt throwing things on Ms. Freeze's desk.

[8] Plaintiffs' periodic evaluations were not all critical. There were references to plaintiffs' work as "good" and to Ms. Brenner as "very conscientious." There are also references to Ms. Brenner's "need to be more flexible" and need "to learn to work as a team." There are references to the need for Ms. Broadbelt "to cut down on errors" and "to show support to the unit and work with everyone in the team."

backlog that had developed and resulted in mandatory overtime work for the coders. The new system combined the two-step process of coding and data entry into a single process. A new Policy Coding Unit was created to reflect this condensation of operations.

Mr. Nelson, Ms. McAleer and her supervisor, Mildred Alderfer, met in the fall of 1998 to discuss the qualifications necessary for coders in the new unit. Mr. Nelson recognized that there would be a greater need for cross-training and teamwork in the new unit. The group determined which skills would be needed in the new position and then met with Ms. O'Brien who decided that a new job description should be prepared. Mary Buhring in the Human Resources Department developed the new job description in consultation with Mr. Nelson, Ms. McAleer and Ms. O'Brien. A job description reflecting the essential duties common to all coders, the job knowledge required for all coders and the additional duties of a senior coding clerk and specialist was drafted.

By late January 1999, Mr. Nelson had decided that Ms. Niess was the most qualified person to supervise the new unit. Because there were more employees in the Policy Processing Department than available positions in the new Policy Coding Unit, Mr. Nelson, Ms. O'Brien and Ms. McAleer decided to post the

new positions and allow qualified employees in the Coding, Data Entry and Technical Services Units to apply for them.

An outside vendor prepared a report reflecting a reduced work force after implementation of the new software application. In March of 1999, the number of supervisors was reduced from three to two. The new Coding Unit was to have fourteen employees, nine coders and five specialists. The staff of the Technical Services Unit was reduced from seven to six. The staff of the Data Entry Unit was reduced from thirteen to eight. A new job description was drafted and a competitive hiring process was undertaken with respect to the new coding positions.

Ms. McAleer held a meeting of all coders, data entry and technical services employees on March 5, 1999. She explained that on March 29, 1999, the coding operation was moving to a different section of the building and would have a new name, a new mission and new leadership. She explained that positions in the new unit would be posted and applications would have to be submitted by March 11th. She explained that applicants would be interviewed and then evaluated and selected based upon elements contained in the job description. She also explained that any employee whose "employment is terminated as a result of this process or because you did not apply for the coding position" who

worked through March 26th and signed a release would be eligible for a severance package.

The following Monday, Ms. O'Brien held a meeting for employees affected by the reorganization at which she addressed questions. She explained that each employee who took the severance package would receive one week of pay and medical benefits for each year of service.

Plaintiffs and Ms. Bauer were not certain that if given a position in the new unit, they would remain at the same pay grade. They were unsure whether they would be entitled to severance if they applied for and were offered a new position but declined to accept the offer. Following the meeting, Ms. Bauer sent a letter to Ms. O'Brien which read "I would like in writing what I am entitled to regarding my severance coverage package: as was stated by you at the meeting held on March 8, 1999."

Plaintiffs consulted counsel and on his advice submitted a joint letter with Ms. Bauer which was delivered to Ms. O'Brien on March 10, 1999. The letter reads "Human Resources Department: We are requesting a copy of the written severance plan and any separation agreement that would apply." Plaintiffs did not inform Ms. O'Brien or any other member of management that they had consulted with counsel. Ms. O'Brien told plaintiffs that she would get the information as soon as possible but they should apply for the positions if they were interested.

Plaintiffs did not receive a copy of the severance agreement until after the application deadline.[9]

Plaintiffs submitted their applications for the open coding positions on March 11th. Each attached to the application a letter stating that "[s]ince I did not receive the severance plan and separation agreement yesterday, March 10, 1999, I'm handing in the application with the understanding that I still have a choice about severance."

Fourteen employees from the Policy Processing Department applied for fourteen positions. Twelve applicants were from the Coding Unit and one each were from the Data Entry and Technical Support Units. Each applicant was interviewed by Ms. McAleer, Ms. Niess and Mr. Nelson.[10] The interviewers took notes and then completed a competency rating worksheet after each interview in which the applicant was rated in nine different competencies with a score between one and four.

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[9] By letter dated March 12, 1999, Ms. O'Brien provided each person with a form letter, copy of the release, copy of the severance agreement and description of the severance package. The letter was addressed to employees who had "elected not to apply for a position in the new coding unit or [who had] not been selected to transfer into the new coding unit." Plaintiffs received this on March 16, 1999.

[10] The interviewers did not review the applicants performance evaluations prior to conducting the interviews, although Ms. Niess and Ms. McAleer had historical knowledge of plaintiffs' performance. In Mr. Nelson's case, it was his specific intention to conduct the interviews without knowledge of the applicants' prior work history or performance.

Both plaintiffs made a poor impression on each of the interviewers. In her interview with Mr. Nelson, Ms. Broadbelt said she was waiting for a written response from Human Resources regarding the severance package and had not decided whether she wanted the job. She did not answer many of his questions or simply responded "I don't know." Ms. Niess noted that Ms. Broadbelt "[n]ever said anything about working together" and "[I] tried to ask questions but [she] never answered them." Ms. McAleer was left with the impression that Ms. Broadbelt had no real interest in the new position.

Ms. Brenner informed Mr. Nelson that she had not decided what she wanted to do and would not until she received the severance information. When asked what she thought the company could do to increase productivity, Ms. Brenner responded "I don't think you can." Ms. Niess noted that Ms. Brenner expressed a series of work-related grievances. Ms. McAleer concluded after interviewing Ms. Brenner that she had no enthusiasm and was not really interested in the job.

The interviewers gave plaintiffs the lowest interview scores, followed by Ms. Bauer. Based on the interview scores and their historical knowledge, Ms. Niess and Ms. McAleer concluded that job offers should be made to each person interviewed except plaintiffs and Ms. Bauer. Mr. Nelson concluded that Ms. Bauer should be offered a position but otherwise agreed with the other

interviewers. Ms. Niess and Ms. McAleer ultimately agreed that Ms. Bauer should be offered a position.

On March 16, 1999, Ms. McAleer called each plaintiff in turn into her office to inform them that they had not been selected for a position in the new unit and thus would not be retained.[11] After the meeting, each plaintiff was escorted back to her respective workstation to gather personal effects and then out of the building. They were able to return later in the day to gather additional effects without escort.

Plaintiffs signed and sent to defendant a letter dated March 23, 1999 which was prepared by their counsel. In the letter, plaintiffs seek a formal explanation for their termination and observe in reference to persons selected for retention that the "only difference between us and them is about 20 years."[12]

Ms. Broadbelt was then 57 years of age. Ms. Brenner was then 56 years of age. Of the fourteen persons interviewed, twelve were given job offers. The average age of the interviewees was 46.7 years. The average age of those selected was 44.91 years. Of the twelve persons selected, seven were over

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[11] Mr. Nelson was also present.

[12] This was followed by a letter from plaintiffs' counsel dated April 7, 1999. This was the first knowledge defendant had that plaintiffs engaged counsel.

40 years of age. Two were 57 years old, one was 58 and one was 60.

At the time of plaintiffs' termination, Ms. Brenner had nineteen years of service with Harleysville and Ms. Broadbelt had eighteen years. The Harleysville employee manual provides that former employees with twenty years of service who were 50 years old as of December 31, 1992 were eligible for an annual contribution of $1026 per year for themselves and $456 for their spouses until they reached the age of 65 when the annual contribution is decreased to $528 for the retiree and $235 for the spouse.[13]

Ms. Bauer elected not to accept the offer of the new position and took the severance package. This left the unit with eleven employees. To eliminate the backlog, Ms. Niess implemented mandatory overtime and asked Gail Constanzer and Janet Dormann, two former coders who had recently retired, to return to work. Ms. Constanzer was 62 years of age when she was rehired and Ms. Dormann was 60 years of age.

During the course of 1999 and 2000, Ms. Niess also hired new coders from the outside and employees who transferred from other departments. The four persons newly hired in 1999 ranged in age from 26 to 51, with an average age of 34.5. The

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[13] The benefits increase progressively in five year intervals for employees with terms of service greater than twenty years.

four persons newly hired in 2000 range in age from 18 to 26 with an average age of 23.

Defendant waived the requirement that plaintiffs work through March 26th to obtain severance benefits. The letter with the release and severance agreement sent by Ms. O'Brien and received by plaintiffs on March 16th advised that they had twenty-one days in which to elect the severance package. In response to plaintiffs' request for clarification of the severance agreement and the reason for their termination, Ms. O'Brien sent a revised agreement to plaintiffs on April 6th giving them forty-five days in which to accept the severance package. Plaintiffs declined and then filed substantially identical administrative charges of age discrimination and retaliation.

IV. Discussion

A. Age Discrimination

The same general standards and analyses apply to plaintiffs' ADEA and PHRA discrimination and retaliation claims. See Fogleman v. Mercy Hosp. Inc., 283 F.3d 561, 567 (3d Cir. 2002)(ADEA & PHRA retaliation claims); Newman v. GHS Osteopathic, Inc., Parkview Hosp., 60 F.3d 153, 156-57 (3d Cir. 1996)(ADEA & PHRA discrimination).

The plaintiffs can sustain a claim of discrimination by presenting direct evidence of discrimination or by using

circumstantial evidence. See Waldron v. SL Indus., 56 F.3d 491, 494 n.4 (3d Cir. 1995). Direct evidence is overt or explicit evidence which directly reflects a discriminatory bias by a decision maker. See Armbruster v. Unisys Corp., 32 F.3d 768, 778, 782 (3d Cir. 1994). Where it appears from such evidence that some form of illegal discrimination was a substantial factor in an adverse employment decision, the burden shifts to the defendant to show that "the decision would have been the same absent consideration of the illegitimate factor." Price Waterhouse v. Hopkins, 490 U.S. 228, 276 (1989). See also Keller v. Orix Credit Alliance, Inc., 130 F.3d 1101, 1113 (3d Cir. 1997); Jones v. School Dist. of Phila., 19 F. Supp. 2d 414, 417-18 (E.D. Pa. 1998). Where, as here, a plaintiff does not present direct evidence of discrimination, she may nevertheless survive summary judgment on a McDonnell Douglas pretext theory.

A plaintiff must first establish a prima facie case by showing that she was a member of a protected class; was qualified for the job she held or sought; was discharged or denied a position; and, was replaced by or rejected in favor of a person outside the protected class or sufficiently younger to create an inference of age discrimination, or otherwise present evidence sufficient to support an inference of unlawful discrimination. See Showalter v. Univ. of Pittsburgh Med. Ctr., 190 F.3d 231, 234 (3d Cir. 1999); Simpson v. Kay Jewelers, 142 F.3d 639, 644 (3d

Cir. 1998); Keller v. Orix Credit Alliance, Inc., 130 F.3d 1101, 1108 (3d Cir. 1997); Chipollini v. Spencer Gifts, Inc., 814 F.2d 893, 897 (3d Cir. 1987). In the context of a reduction in force, the fourth element may be satisfied by a showing that the employer retained sufficiently younger employees. See Anderson v. Conrail, 297 F.3d 242 (3d Cir. 2002); Showalter, 190 F.3d at 235. For purposes of a prima facie ADEA case, the fourth element contemplates an age difference of at least five years. See Fakete v. Aetna, Inc., 152 F. Supp. 2d 722, 735 (E.D. Pa. 2001).

The burden then shifts to the employer to proffer a legitimate, non-discriminatory reason for the adverse employment action. See St. Mary's Honor Ctr., 509 U.S. at 506-07; Goosby v. Johnson & Johnson Med. Inc., 228 F.3d 313, 319 (3d Cir. 2000). A plaintiff may still prevail by demonstrating that the employer's proffered reasons were not its true reasons but rather a pretext for unlawful discrimination. See Reeves v. Sanderson Plumbing Prod. Inc., 530 U.S. 133, 143 (2000); Goosby, 228 F.3d at 319.

A plaintiff must present evidence from which a factfinder could reasonably disbelieve the employer's proffered reasons from which it may be inferred that the real reason was discriminatory, or otherwise present evidence from which one could reasonably find that unlawful discrimination was more likely than not a determinative cause of the employer's action. See Hicks, 509 U.S. at 511 & n.4; Keller, 130 F.3d at 1108. To

discredit a legitimate reason proffered by the employer, a plaintiff must present evidence demonstrating "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions" in that reason that one could reasonably conclude it is incredible and unworthy of credence, and ultimately infer that the employer did not act for the asserted non-discriminatory reasons. See Fuentes v. Perskie, 32 F.3d 759, 765 (3d Cir. 1994).

The ultimate burden of proving that a defendant engaged in intentional discrimination remains at all times on the plaintiff. See Hicks, 509 U.S. at 507, 511.

Plaintiffs have presented a prima facie case. They are more than 40 years old. They were qualified for the new coder position.[14] They were not hired for the position.[15] The

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[14] Defendant contends that by expressing disinterest in the new position, plaintiffs were not qualified for it and that by not expressing interest in the position, they failed to complete the hiring process and were thus unqualified. By submitting an application and interviewing, plaintiffs did all that was required to apply for the new position. One could reasonably find from the evidence that plaintiffs had the objective qualifications for the new position. An analysis of subjective qualifications such as demeanor and performance are better addressed at the pretext stage. See Goosby 228 F.3d 320; Weldon v. Kraft, Inc., 896 F.2d 793, 798 (3d Cir. 1990).

[15] The parties differ as to whether plaintiffs' separation from Harleysville is properly characterized as a firing or a reduction in force. Plaintiffs characterize the separation as a firing. Defendant characterizes it as a reorganization. The uncontroverted evidence shows that the positions were open not only to coders but staff in data entry and technical support and that the number of staff in the unit as a whole was reduced by implementation of the software system. In any event, whether the event is characterized as a firing or result of a reorganization would not change the analysis of plaintiffs' age discrimination claims in any material respect.

defendant filled some, although clearly not all, of the open coder positions with persons sufficiently younger than plaintiffs.

Defendant's reason for not retaining plaintiffs in new positions was the unanimous perception of the interviewers that they were negative, uncooperative and disinterested, buttressed in the case of Ms. Niess and Ms. McAleer by prior experience with plaintiffs.

All employees were explicitly informed that positions in the new unit would be filled through a competitive process requiring an application and interviews. They were informed that the company sought individuals committed to making the new Policy Coding Unit work and that this particularly required additional emphasis on teamwork and cooperation. Plaintiffs utterly failed to convey to the interviewers any sense of commitment to the new unit. They also had a history of conflict with supervisors and co-workers.

That plaintiffs may believe that the process should have focused more on experience and performance factors like production than attitude and capacity for teamwork does not establish pretext. It is the employer's business prerogative to develop the desired skill set for the job. See Bullington v. United Airlines, Inc., 186 F.3d 1301, 1318 (10th Cir. 1999) (plaintiff's "opinion about the fairness or accuracy of the

interviewers' evaluation is not evidence of pretext"); Simpson, 142 F.3d at 647 ("The employee's positive performance in another category is not relevant [and] neither is the employee's judgment as to the importance of the stated criterion"); Fuentes, 32 F.3d at 765 ("the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is 'wise, shrewd, prudent or competent'"); Billet v. CIGNA Corp., 940 F.2d 812, 825 (3d Cir. 1991) ("what matters is the perception of the decision maker"); Billups v. Methodist Hosp. of Chicago, 922 F.2d 1300, 1304 (7th Cir. 1991) (inquiry regarding genuineness of nondiscriminatory reason "is limited to whether the employer's belief was honestly held"); Holder v. City of Raleigh, 867 F.2d 823, 829 (4th Cir. 1989) ("a reason honestly described but poorly founded is not a pretext"); Healy v. New York Life Ins. Co., 860 F.2d 1209, 1220 (3d Cir. 1988) (an employer "has the right to make business judgments on employee status, particularly when the decision involves subjective factors such as creativity and initiative that the Company deems essential"); Hicks v. Arthur, 878 F. Supp. 737, 739 (E.D. Pa. 1995) (that a decision is ill-formed or ill-considered does not make it pretextual), aff'd, 72 F.3d 122 (3d Cir. 1995).

The record is devoid of evidence of pretext. One cannot reasonably conclude from the competent evidence of record that defendant's perception of plaintiffs' interview performance

and history of antipathy toward supervisors and co-workers in an environment where greater teamwork and cooperation were to be emphasized was not the real reason for the decision not to offer plaintiffs new positions in the restructured operation.

B. ADEA and PHRA Retaliation Claims

To establish a prima facie case of retaliation, a plaintiff must show that she engaged in protected activity, that she was subsequently or contemporaneously subject to an adverse employment action and that there was a causal link between the protected activity and the adverse action. See Fogelman, 283 F.3d at 568; Weston v. Pennsylvania, 251 F.3d 420, 430 (3d Cir. 2001); Krouse v. American Sterilizer Co., 126 F.3d 494, 500 (3d Cir. 1997); Woodson v. Scott Paper, Co., 109 F.3d 913, 920 (3d Cir. 1997); Barber v. CSX Distribution Servs., 68 F.3d 694, 701 (3d Cir. 1995); Nelson v. Upsala College, 51 F.3d 383, 386 (3d Cir. 1995); Jalil v. Avdel Corp., 873 F.2d 701, 708 (3d Cir. 1989), cert. denied, 493 U.S. 1023 (1990). The burden then shifts to the defendant to offer a legitimate non-retaliatory reason for the adverse action. See Woodson, 109 F.3d at 920; Jalil, 763 F.2d at 708. The plaintiff must then discredit any such reason and show that the real reason was retaliatory. See Krouse v. American Sterilizer Co., 126 F.3d 494, 501 (3d Cir. 1997).

As noted, to discredit a legitimate reason proffered by the employer, a plaintiff must present evidence demonstrating such weaknesses, implausibilities, inconsistencies, contradictions or incoherence in that reason that one could reasonably conclude it is incredible and unworthy of belief. Fuentes, 32 F.3d at 764-65; Ezold v. Wolf, Block, Schorr & Solis-Cohen, 983 F.2d 509, 531 (3d Cir. 1992), cert. denied, 510 U.S. 826 (1993). "To discredit the employer's proffered reason, the plaintiff cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent or competent." Fuentes, 32 F.3d at 765.

The burden of proving that retaliation was more likely than not a determinative cause of the adverse action remains at all times with the plaintiff. See Krouse, 126 F.3d at 501; Woodson, 109 F.3d at 920 n.2.

Opposition to discrimination on the basis of age is protected conduct.[16] Protected conduct is not limited to a

[16] The ADEA provides: "It shall be unlawful for an employer to discriminate against any of his employees . . . because such individual . . . has opposed any practice made unlawful by this section, or because such individual . . . has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this Act." 29 U.S.C. § 623(d). The PHRA contains a substantially identical provision. See 43 Pa. C.S.A. § 955(d).

formal charge of age discrimination. A general complaint of unfair treatment, however, will not support a charge of illegal discrimination. See Barber, 68 F.3d at 701-02 (letter complaining that position was awarded to less qualified individual does not constitute protected conduct).

As plaintiffs concede, the first time they ever suggested the possibility of age discrimination was in the letter prepared by counsel and signed by plaintiffs in which they seek an explanation for their termination and observe that the "only difference between us and them is about 20 years." The letter, however, neither preceded nor coincided with the termination. There is thus clearly no causal connection between the letter and the adverse decision which preceded it as a matter of law and logic.

Apparently in recognition of the futility of having predicated their retaliation claims on any letter sent after their termination, in a reply brief to the motion for summary judgment plaintiffs attempt to recharacterize the adverse employment action as the failure of Harleysville to include them among the pool of former employees rehired in the spring of 1999. Defendant correctly notes that plaintiffs never administratively exhausted any retaliatory failure to rehire claim.

As a precondition for filing suit under the ADEA or the PHRA, a plaintiff must exhaust a claim by presenting it in an

administrative charge to the EEOC and the PHRC. See Fakete v. Aetna, Inc., 152 F. Supp. 2d 722, 731 (E.D. Pa. 2001). The scope of a judicial complaint is not limited to the four corners of the administrative charge. See Love v. Pullman, 404 U.S. 522, 527 (1972); Hicks v. ABT Assoc., 572 F.2d 960, 963 (3d Cir. 1978); Duffy v. Massinari, 202 F.R.D. 437, 440 (E.D. Pa. 2001). It is delimited, however, to acts fairly within the scope of the charge or the investigation which can reasonably be expected to result from it. See Holtz v. Rockefeller & Co., 258 F.3d 62, 83 (2d Cir. 2001); Hicks, 572 F.2d at 966; Ostapowicz v. Johnson Bronze Co., 541 F.2d 394, 398-99 (3d Cir. 1976); Shouten v. CSX Transp., Inc., 58 F. Supp. 2d 614, 616 (E.D. Pa. 1999).

There must be a close nexus between the facts supporting each claim or an additional claim in the judicial complaint must fairly appear to be an explanation of the original charge or one growing out of it. See Duffy, 202 F.R.D. at 440; Galvis v. HGO Serv., 49 F. Supp. 2d 445, 448-49 (E.D. Pa. 1999). A plaintiff may not maintain a failure to rehire claim based on an administrative charge of age discrimination in termination. See Sauzek v. Exxon Coal USA, Inc., 202 F.3d 913, 920 (7th Cir. 2000) ("An EEOC charge alleging age discrimination in termination alerts neither the EEOC nor the employer that a charge of discriminatory failure to rehire may be forthcoming [and a] plaintiff must include both charges with the EEOC"). See also

Lawson v. Burlington Indus., 683 F.2d 862, 863-64 (4th Cir. 1982).[17]

C. Retaliation under ERISA

Section 510 of ERISA prohibits an employer from retaliating against an employee with the specific intent to interfere with her rights to ERISA plan benefits. See 29 U.S.C. § 1140; DeFederico v. Rolm Co., 201 F.3d 200, 204-05 (3d Cir. 2000); DeWitt v. Penn-Del Directory Corp., 106 F.3d 514, 522 (3d Cir. 1997); Gavalik v. Cont'l Can Co., 812 F.2d 834, 851 (3d Cir.), cert. denied, 484 U.S. 979 (1987).

To sustain a claim under § 510, a plaintiff must show that the employer took specific actions for the specific purpose of interfering with an employee's attainment of benefit rights. Eichorn v. AT&T Corp., 248 F.3d 131, 149 (3d Cir. 2001). Proof

[17] In any event, one could not reasonably find from the competent evidence of record any causal connection between the complaints of age discrimination to Ms. O'Brien and a failure to rehire. It is uncontroverted that Debra Niess made the decision to rehire former employees. Ms. O'Brien never gave a copy of plaintiffs' letter to Ms. Niess and there is no evidence that Ms. Niess otherwise knew of plaintiffs' suggestion of age discrimination. See Moore v. Reese, 817 F. Supp. 1290, 1298 (D. Md. 1993) (decision-maker's unawareness of protected activity makes establishment of causal connection impossible). Plaintiffs have also failed to show that any decision not to rehire them was pretextual. The former employees who were rehired had not been previously terminated. It would defy logic to postulate that defendant found plaintiffs unworthy of retention but would have rehired them had they not alleged discrimination in response. Indeed, had defendant rehired plaintiffs shortly after terminating them, this would be evidence of pretext.

of an incidental loss of benefits as a result of termination does not constitute a violation.

A plaintiff must show that "the employer made a conscious decision to interfere with the employee's attainment of pension eligibility or additional benefits." DeWitt, 106 F.3d at 523; see also Turner v. Schering-Plough Corp., 901 F.2d 335, 347 (3d Cir. 1990). "Where the only evidence that an employer specifically intended to violate ERISA is the employee's lost opportunity to accrue additional benefits, the employee has not put forth evidence sufficient to separate that intent from the myriad of other possible reasons for which an employer might have discharged him." Turner v. Schering-Plough Corp., 901 F.2d 335, 348 (3d Cir. 1990) (quoting Clark v. Resistoflex Co., 854 F.2d 762, 771 (5th Cir. 1988)). See also Bunnion v. Consol. Rail Corp., 108 F. Supp. 2d 403, 420 (E.D. Pa. 1999).

Once the employer satisfies the burden of articulating a legitimate reason for the conduct complained of, the burden shifts back to the plaintiff to show that the employer's rationale was pretextual and that the cancellation of benefits was a "determinative influence" on the employer's actions. Eichorn, 248 F.3d at 149; DiFederico, 201 F.3d at 205.

Plaintiffs have presented no competent evidence that Ms. Niess, Ms. McAleer or Ms. Nelson knew plaintiffs' ages, years of service or the terms of the retiree health benefits plan, let

alone all three which would be necessary to determine eligibility. Moreover, as discussed, plaintiffs have failed to discredit the legitimate reason of these decision-makers for the adverse employment action.

V. Conclusion

If there is competent evidence to support plaintiffs' claims, they have not produced it.

Plaintiffs have failed to present competent evidence from which one could reasonably find defendant's legitimate reason for the challenged decision was pretextual. They have failed to show any causal connection between that decision and their subsequent complaints of age discrimination. A failure to rehire claim was never raised administratively and in any event the decision not to include them in the pool of former employees who were rehired was made by someone without knowledge of plaintiffs' complaint of age discrimination. There is no competent evidence of record from which one could reasonably find that defendant made a conscious decision to interfere with plaintiffs' eligibility for benefits.

Accordingly, defendant is entitled to summary judgment. Defendant's motion will be granted. An appropriate order will be entered.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JANET B. BRENNER and	:	**CIVIL ACTION**
VIRGINIA A. BROADBELT	:	
v.	:	
	:	
THE HARLEYSVILLE INSURANCE COS.	:	**NO. 01-08**

O R D E R

AND NOW, this day of September, 2002, upon consideration of defendant's Motion to Dismiss (Doc. #19) and plaintiffs' response thereto, consistent with the accompanying memorandum, **IT IS HEREBY ORDERED** that said Motion is **GRANTED** and accordingly **JUDGMENT** is **ENTERED** in the above action for the defendant.

BY THE COURT:

_____
JAY C. WALDMAN, J.